United States Court of Appeals

for the Second Circuit

APPELLANT BRIEF ON REHEARING EN BANC

No. 76-7631

In the

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ORECK CORPORATION, *Plaintiff-Appellee,* *vs.* **WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,** *Defendants-Appellants.*	Appeal from the United States District Court, Southern District of New York. — Honorable **Richard Owen,** Judge Presiding.

DEFENDANTS' JOINT BRIEF ON REHEARING EN BANC

BURTON Y. WEITZENFELD,
MICHAEL R. TUROFF,
STANLEY M. LIPNICK,
PATRICK F. GEARY,
ARNSTEIN, GLUCK,
WEITZENFELD & MINOW,
Of Counsel,
233 South Wacker Drive,
Suite 7500,
Chicago, Illinois 60606,
(312) 876-7100,
Attorneys for Whirlpool Corporation.

ALVIN K. HELLERSTEIN,
ROBERT P. STEIN,
STROOCK & STROOCK & LAVAN,
Of Counsel,
61 Broadway,
New York, New York 10006,
(212) 425-5200,
Attorneys for Whirlpool Corporation.

CHARLES A. TAUSCHE,
Sears Tower,
Chicago, Illinois 60684,
(312) 875-9206,
Attorney for Sears, Roebuck and Co.,

JOSEPH J. SKINNER,
1633 Broadway,
New York, New York 10019,
(212) 977-6766,
Attorney for Sears, Roebuck and Co.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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PRELIMINARY STATEMENT

This is an appeal from a judgment, in the amount of $2,250,000 plus attorneys' fees and costs, in favor of plaintiff-appellee, Oreck Corporation, a distributor of vacuum cleaners. Defendants-Appellants are Whirlpool Corporation (hereinafter "Whirlpool") a manufacturer, and Sears, Roebuck and Co. (hereinafter "Sears"), a retailer. Oreck alleged a conspiracy between Whirlpool and Sears to exclude it from the market for the sale of vacuum cleaners in the United States and Canada, in violation of Section 1 of the Sherman Act (15 U. S. C. § 1). In an opinion by Judge Anderson, in which Judge Brieant con-

curred, a panel of this Court reversed the judgment below and remanded the case to the United States District Court for the Southern District of New York for a new trial. Judge Mansfield dissented.

Oreck and Sears had been Whirlpool's customers for the vacuum cleaners it manufactured. Whirlpool discontinued selling to Oreck, and Oreck alleged that it was discontinued at Sears' insistence. The fundamental difference between the majority and dissent was whether that conduct, if true, was a *per se* violation of Section 1 of the Sherman Act.* The majority held that even if Whirlpool and Sears had combined as Oreck claimed, such combination would not constitute a *per se* violation of the antitrust laws, and, therefore, held that no antitrust violation had been shown since plaintiff had not proved that trade had been unreasonably restrained. The dissent concluded (contrary to the uncontroverted facts introduced by plaintiff itself, and to the very theory upon which plaintiff tried its case) that Oreck was terminated to discipline it for price cutting and therefore a *per se* violation had been shown, making it unnecessary for Oreck to offer any proof of anticompetitive effects of defendants' conduct.

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* The claim that defendants engaged in such conduct was not proved and was erroneously submitted to the jury, as defendants showed at pages 21-26 of their initial joint brief. The majority did not decide this question.

STATEMENT OF FACTS

Since 1957 Whirlpool has manufactured vacuum cleaners which were purchased from it by Sears for resale under Sears' private label, "Kenmore" (A. 323). In 1963, Whirlpool decided to manufacture vacuum cleaners to be sold under its own "Whirlpool" brand and appointed Oreck as its exclusive distributor of "Whirlpool" brand vacuum cleaners for an initial term of five years, with year to year renewals thereafter subject to the right of either party to terminate upon specified notice to the other (PX 3). On June 27, 1968, Whirlpool gave Oreck formal notice of cancellation (DX F, A. 804), but instead of going through with the cancellation, Whirlpool and Oreck entered into a new agreement under which Oreck's distributorship was extended until December 31, 1971, *"at which time this Agreement shall expire"* (PX 44). Shortly after its distributorship agreement expired, Oreck brought this action claiming that its distributorship was not thereafter extended because of insistence by Sears.

A detailed statement of the facts is contained in defendants' initial joint brief, on pages 4 through 13, which pages are reproduced in the appendix to this brief for the Court's convenience. However, a reference to the prices charged by Oreck and Sears was not included there because the complaint did not allege price maintenance (A. 7-20), plaintiff's counsel's opening statement (Tr. 2-1-2-43) and closing arguments (Tr. 1755-1816) made no mention of this subject, and the jury was not instructed on this point (A. 905-945). The contention that Oreck was disciplined for price cutting was thrust into the case for the first time by the dissenting opinion. Accordingly, defendants deem it appropriate and necessary to supplement their original statement of facts with the following:

1. Plaintiff's counsel, in his opening statement, told the jury that the proof would show that Sears, not Oreck, charged the lower prices. Specifically, he stated that

". . . Oreck lost numerous sales because of Sears low pricing . . .". (Tr. 2-36–2-37).

2. The only proof in the record of prices charged by Oreck and Sears is that introduced by Oreck itself. That proof disclosed that Sears sold vacuum cleaners at prices ranging from $18.00 to $24.00. Oreck's price for vacuum cleaners which it claimed were comparable to those sold by Sears was $46.80 (PX 60, 165, Tr. 906 *ff*, 989-994).

ARGUMENT

REVERSAL OF THE JUDGMENT WAS REQUIRED BECAUSE A PER SE VIOLATION WAS NOT INVOLVED AND ORECK FAILED TO PROVE AN UNREASONABLE RESTRAINT OF TRADE

It is undisputed that following expiration of Oreck's Whirlpool distributorship there continued to be substantial effective competition at all levels of the vacuum cleaner trade (PX 107, 108, A 878-879), that Oreck obtained a new source of supply for vacuum cleaners (A. 408-409, 887-889), and that at the time of trial Oreck was the "world's largest seller of top fill uprights." (DX U). On these uncontroverted facts, the majority properly concluded that the evidence disclosed "nothing more than the refusal by Whirlpool to renew Oreck's exclusive distributorship of Whirlpool vacuum cleaners under the 'Whirlpool label' and the replacement of Oreck, in effect, by Sears, the other existing distributor, who sold the same manufacturer's vacuum cleaner but under the label, 'Kenmore' " (Op. p. 6054).

The majority held that an agreement or combination such as plaintiff had alleged was not a *per se* violation. They correctly applied to the uncontroverted facts in this case the consistent decisions of the Circuits which have previously decided the issue. Thus, in *Alpha Distributing Co. of California* v. *Jack Daniel Distillery*, 454 F. 2d 442, 452 (9th Cir., 1972), cited by the dissent, the Court stated:

> "It is not a *per se* violation of the antitrust laws for a manufacturer or supplier to agree with a distributor to give him an exclusive franchise, *even if this means cutting off another distributor.* Moreover, without more, it is not a *per se* violation for the manufacturer or supplier *to combine or conspire with others* to make a change in its exclusive

franchises, cutting off the supply of a former distributor." (citations omitted, emphasis supplied.)

Elder-Beerman Stores Corp. v. *Federated Dept. Stores, Inc.*, 459 F. 2d 138, 146 (6th Cir., 1972), involved a claimed violation of Section 1 by the leading department store in Dayton which coerced its suppliers not to sell to the plaintiff, a competing department store. The Court held the *per se* rule inapplicable and, instead, applied the rule of reason, stating:

> "We interpret the 'rule of reason' as meaning that *the granting of exclusive rights*, . . . acts which are not prohibited by law *unless there is a resulting foreclosure of market alternatives cannot*, without proof of such foreclosure, *form the basis for a jury verdict that the defendants had entered into a conspiracy to restrain trade.*" (footnote omitted, emphasis supplied.)

The evidence in the instant case, as in *Elder-Beerman*, is uncontroverted that market alternatives were available to Oreck. Indeed, the evidence shows that Oreck readily obtained a new source of supply for vacuum cleaners which it sold with ever increasing success (A. 408-409, 887-889).

In *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir., 1957), *cert. denied*, 355 U. S. 822 (1957), an automobile manufacturer terminated two of three competing Packard dealers in Baltimore because the third had insisted upon an exclusive distributorship. The Court of Appeals held that this conduct was not a *per se* antitrust violation, but rather that its legality was to be judged under the rule of reason. In reversing the District Court, the Court of Appeals stated, at page 420:

> "When an exclusive dealership 'is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality' until the district court decided the present case." (footnote omitted.)

This Court, in a *dictum*, has recognized that a manufacturer and one of its customers may agree that the former will sell exclusively to the latter without violating the antitrust laws, as follows:

> "Where a manufacturer simply decides on his own to substitute one dealer for another, and cuts off the former dealer, his decision to sell exclusively to a new dealer does not amount to an antitrust 'conspiracy' with the latter . . . *even though the manufacturer has agreed with the new dealer to transfer patronage to him and to terminate sales to the former dealer. . . .*" *Bowen* v. *New York News, Inc.*, 522 F. 2d 1242, 1254 (2nd Cir. 1975) (citations omitted, emphasis supplied).

See also United States v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 381 (1967), *overruled on other grounds, Continental T. V., Inc.* v. *GTE Sylvania Inc.*, ... U. S. ....., 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U. S. 1062 (1970); *Bay City-Abrahams Bros., Inc.* v. *Estee Lauder, Inc.*, 375 F. Supp. 1206, 1214-16 (S. D. N. Y. 1974), and *Top-All Varieties, Inc.* v. *Hallmark Cards, Inc.*, 301 F. Supp. 703, 704-5 (S. D. N. Y. 1969). These cases are cited in the majority opinion and are in accord with the principle that an agreement by a manufacturer with one customer to sell exclusively to that customer is not, without more, an antitrust violation, even when another customer is cut off pursuant to such agreement.*

There can be no suggestion on this record of any foreclosure of market alternatives or lessening of competition on any level as a result of the termination of Oreck's Whirlpool vacuum cleaner distributorship. Before Oreck was formed, during its tenure as a Whirlpool distributor, and thereafter, more than twenty companies manufactured vacuum cleaners, including such

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* These cases and numerous others which are also in accord are fully discussed on pages 14-19 of defendants' initial joint brief.

well-known names as Hoover, Eureka and Electrolux (PX 108, A. 878-879). Hence, there was never a shortage of manufacturers, and Oreck was concededly able to find a new supplier of vacuum cleaners and at the time of trial was "the world's largest supplier of top fill upright vacuum cleaners." (Op. p. 6054.)

Nor did termination of Oreck's distributorship lessen any competition between Sears and Oreck in the sale of vacuum cleaners. The vacuum cleaners which Oreck purchased from Whirlpool were physically different than those purchased by Sears (Tr. 1371-1373). Sears sold vacuum cleaners under its own brand name "Kenmore," while Oreck sold vacuums under the "Whirlpool" brand. There was no suggestion that the Whirlpool brand vacuum cleaners which were no longer sold to Oreck, and which were never sold to Sears under that or any other brand, had any particular consumer demand. On these undisputed facts, as the majority recognized (Op. pp. 6057-6060), the termination of Oreck's Whirlpool distributorship could not conceivably have lessened any competition which confronted Sears.

Judge Mansfield's dissenting opinion did not question the validity of the case law discussed above, nor did it quarrel with the majority finding that Oreck had not proven any anticompetitive result of the termination of its distributorship. Rather, he asserted that those cases were inapplicable and that an unreasonable effect upon competition should be presumed in the absence of proof because, in his view, the record in this case reveals conduct by Whirlpool and Sears which was illegal *per se*. He conceived such conduct to consist of price maintenance, and a horizontal conspiracy.

Judge Mansfield's belief that illegal price maintenance was involved was derived from an apparent misapprehension that Sears' prices for vacuum cleaners were higher than Oreck's and that Oreck was being disciplined for price cutting. Thus, he stated:

1. "The motive [for the termination] was clear—to prevent Oreck's price-cutting and other competitive practices from interfering with *Sears' higher prices* and its sales of Whirlpool-made vacuum cleaners." (Opinion, p. 6061, emphasis supplied.)
2. "As a result [of the termination] the public lost the benefit of Oreck's competition and particularly of its *lower prices in the sale of Whirlpool vacuum cleaners.* Thereafter, if customers wanted Whirlpool machines they would have to buy them from Sears and pay Sears' *higher prices.*" (Opinion, p. 6061, emphasis supplied.)
3. "Oreck soon found that it could not compete with Sears in selling Whirlpool-made vacuum cleaners at Sears' prices and decided that it could distribute them profitably only by selling at *lower prices.* . . ." (Opinion, p. 6064, emphasis supplied.)
4. On page 6066 of the slip opinion the dissent concludes that Whirlpool and Sears agreed to terminate Oreck because of its mail-order solicitations and lower prices:

   > "to which Sears objected because of the possible adverse effect on its sale of Whirlpool vacuum cleaners under its own label at *higher prices.* . . ." (emphasis supplied.)

5. On page 6073 of the slip opinion the dissent indicates that evidence was presented to show that Oreck:

   > "was terminated *because he was a price cutter or in order to maintain high intrabrand prices.*" (emphasis supplied.)

These statements lack any support in the record. The undisputed evidence, introduced by Oreck itself, is that Sears' prices were substantially *lower,* not higher, than Oreck's. As noted in the Statement of Facts (page 4 of this brief), Oreck's evidence showed that Sears was selling "Kenmore" vacuum cleaners for $18 to $24 while Oreck charged $46.80 for "Whirlpool" vacuum cleaners which it claimed were comparable (PX 60, 165, Tr. 906 *ff,* 989-994). Oreck, therefore, did not, as indeed it could not, claim that it was cut off because it was

a price cutter. Rather, plaintiff's counsel told the jury in his opening statement:

> ". . . Oreck lost numerous sales because of Sears' low pricing, and, indeed, it lost good will when a customer of Oreck's found the Sears' vacuum cleaner looking just like the Oreck machine, the Sears' machine being on sale at a considerably lower price." (Tr. 2-36-2-37.)

Oreck never pleaded any claim of price maintenance (A. 7-20). It offered no jury instruction regarding it (Tr. 1650-1692), nor did it argue price maintenance to the jury (Tr. 1755-1816). Its brief in this Court proceeded on the theory of a group boycott, not on any claimed price maintenance. Even Oreck's petition for rehearing does not attempt to support Judge Mansfield's price maintenance theory. The dissent's price maintenance theory is *contra* to the facts and to Oreck's own theory of the case.

The dissent's acceptance of plaintiff's analogy of this case to *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959), and *United States* v. *General Motors Corp.*, 384 U. S. 127 (1966), is equally erroneous. The majority properly found these cases inapplicable because Whirlpool and Sears, the only two alleged conspirators, are on different levels in the distribution system, and do not compete with one another (Op. p. 6058).* *Klor's* involved an alleged horizontal conspiracy between several manufacturers and several distributors to boycott a discounting retailer. It did not involve alleged joint action of a single manufacturer and a single distributor. As the Supreme Court itself said in *Klor's:*

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* Defendants pointed out, on page 3 of their joint reply brief, that the Supreme Court had recognized the importance of distinguishing between concerted action of a "horizontal nature" (between competitors on the same level of the market) and "vertical" restraints (between persons at different levels of the market structure). *See United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 608 (1972); *see also Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, ... U. S. ....., 53 L. Ed. 2d 568, 585, n. 28, 97 S. Ct. 2549 (1977), discussed on pp. 11-12 of this brief.

"[t]his is not a case of . . . a manufacturer and a dealer agreeing to an exclusive distributorship." 359 U. S. at 212.

General Motors also involved a horizontal conspiracy, between several competing Chevrolet dealers in Los Angeles not to sell to discounters, which General Motors agreed to enforce. The Supreme Court later said that the horizontal nature of this combination of competitors was the reason for applying the rule of *per se* illegality. *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, ... U. S. ....., 53 L. Ed. 2d 568, 585, n. 28, 97 S. Ct. 2549 (1977).

United States v. *Hilton Hotels Corp.*, 467 F. 2d 1000 (9th Cir. 1972), *cert. denied*, 409 U. S. 1125 (1973) and *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F. 2d 1230 (3rd Cir. 1975), were also cited by the dissent. They too involved horizontal conspiracies between persons operating at the same level of distribution, a situation not present here.

Quality Mercury, Inc. v. *Ford Motor Co.*, 542 F. 2d 466 (8th Cir. 1976), although cited by the dissent, actually supports the position of defendants. It involved an agreement between Ford and a Lincoln dealer not to grant another Lincoln franchise and was remanded to the lower court for a factual determination as to whether the agreement was reasonable or unreasonable. Hence it conflicts with the view of the dissenting opinion which espouses application of a rule of *per se* illegality to the same type of agreement allegedly made by Whirlpool and Sears.

The dissent's *per se* treatment of the alleged vertical action of Sears and Whirlpool is especially inappropriate in light of *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, ... U. S. ....., 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977), a decision handed down after this case had been briefed and argued. The teaching of that decision is that the Courts should only reluctantly and cautiously apply *per se* treatment to vertical restraints. The Court there stated:

"We revert to the standard articulated in Northern Pac. R. Co., and reiterated in White Motor, for determining

> whether vertical restrictions must be 'conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' 356 US, at 5, 2 L Ed 2d 545, 78 S Ct 514. Such restrictions, in varying forms, are widely used in our free market economy. As indicated above, there is substantial scholarly and judicial authority supporting their economic utility. There is relatively little authority to the contrary. Certainly, there has been no showing in this case, either generally or with respect to Sylvania's agreements, that vertical restrictions have or are likely to have a 'pernicious effect on competition' or that they 'lack . . . any redeeming virtue.' Ibid. Accordingly, we conclude that the per se rule stated in Schwinn must be overruled. In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition under Northern Pac. R. Co. *But we do make clear that departure from the rule of reason standard must be based upon demonstrable economic effect rather than—as in Schwinn—upon formalistic line drawing.*
>
> In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to Schwinn. When competitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act." 53 L. Ed. 2d at 585-586 (footnotes omitted, emphasis supplied.)

Apparently recognizing that to bring this case within the holdings of *Klor's* and *General Motors, supra,* would require a plurality of actors *on the same level of distribution,* the dissent makes the unprecedented suggestion that "Sears was the equivalent of many Whirlpool vacuum cleaner distributors" (Op. p. 6074). The majority opinion recognized this suggestion for what it is, "a novel theory which simply transforms Sears into something it is not" (Op. p. 6058, n. 5). The majority further properly noted that Sears' size does not *"ipso facto,* convert this case into a horizontal conspiracy warranting *per se* treat-

ment" (Op. p. 6058). The notion that a single corporation may be considered more than one entity in order to establish a conspiracy has been consistently rejected. *See Annot.*, Sherman Act Conspiracy, 20 *A. L. R. Fed.* 682, 708 (1974) and cases cited therein. As the Court pointed out in *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Inc.*, 416 F. 2d 71, 84 (9th Cir. 1969):

> "In short, we conclude that if the doctrine of intra-corporate conspiracy is accepted, there is no logical or practical way to avoid holding that all intra-corporate agreements are or may be found to be conspiracies in restraint of trade."

The dissent suggests that defendants had the burden of proving a legitimate business purpose for terminating Oreck's distributorship. While defendants did, in fact, present evidence of the legitimate reason for Oreck's termination,* defendants note that if their alleged conduct is a *per se* violation as the dissent would have it, then their motives and intent are irrelevant as a matter of law. If not a *per se* violation, then plaintiff had the burden of proving the unavailability of reasonably substitutable goods which not even the dissent suggests it did. The dissent's implication that defendants had a burden of proving that they had a lawful motive thus misses the mark under any view of the case.

In defendants' original joint brief, supplemented by this brief, defendants have demonstrated that the decision of the majority is correct and that, contrary to Oreck's claim in its petition for rehearing, rejection of the dissent does not create any new law. The law has been and should remain, as the majority held, that exclusive distributorship arrangements between a manufacturer and one customer, such as the one at bar, are not *per se* unlawful even if a previous customer is terminated and must seek out a new

* Oreck was terminated because it refused to develop the marketing objectives to which Oreck and Whirlpool agreed when Oreck was appointed as Whirlpool's distributor. See pages 5-10 and page 20 defendants' initial joint brief.

supplier. Such agreements are only unlawful if part of a *per se* violation, such as price fixing, or if there is proof of a resulting foreclosure of competitive alternatives in the marketplace. Neither occurred here. The majority simply applied well settled law to the undisputed facts of this case, and its reversal of the trial court judgment should stand.*

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* Defendants invite the attention of the full Court to pages 26-36 of their initial joint brief, showing that there was no proper proof of damages, a question which the majority found it unnecessary to decide. This issue is an additional ground for reversal.

CONCLUSION

For each and all of the foregoing reasons, the trial court's judgment against Whirlpool and Sears was error and the panel's decision reversing it should be sustained. However, since Oreck failed as a matter of law to prove an essential element of its case, Whirlpool and Sears are entitled to judgment rather than the new trial ordered by the panel, and the full Court should therefore order the cause remanded to the trial court with directions to enter judgment for defendants.

Respectfully submitted,

BURTON Y. WEITZENFELD,
MICHAEL R. TUROFF,
STANLEY M. LIPNICK,
PATRICK F. GEARY,
ARNSTEIN, GLUCK,
WEITZENFELD & MINOW,
Of Counsel,
233 South Wacker Drive,
Suite 7500,
Chicago, Illinois 60606,
(312) 876-7100,
Attorneys for Whirlpool Corporation.

ALVIN K. HELLERSTEIN,
ROBERT P. STEIN,
STROOCK & STROOCK & LAVAN,
Of Counsel,
61 Broadway,
New York, New York 10006,
(212) 425-5200,
Attorneys for Whirlpool Corporation.

CHARLES A. TAUSCHE,
Sears Tower,
Chicago, Illinois 60684,
(312) 875-9206,
Attorney for Sears, Roebuck and Co.,

JOSEPH J. SKINNER,
1633 Broadway,
New York, New York 10019,
(212) 977-6766,
Attorney for Sears, Roebuck and Co.

APPENDIX

STATEMENT OF FACTS

Defendant, Whirlpool Corporation (hereinafter "Whirlpool"), is a Delaware corporation with its principal place of business in Benton Harbor, Michigan. It is a well-known manufacturer of a broad range of household appliances, including washing machines, clothes dryers, refrigerators, freezers, garbage disposers, dishwashers, and air conditioners sold under the "Whirlpool" brand and distributed by independent appliance distributors and factory branches to appliance dealers and department stores. (PX 13.) It also manufactures most of the above products for sale to defendant Sears, Roebuck and Co. (hereinafter "Sears"), under the Kenmore or Coldspot label. Sears is a New York corporation with its principal place of business in Chicago and is the owner of less than 5% of Whirlpool's stock. (A. 323.) An officer of Sears serves on the Whirlpool Board. (A. 333-335.)

In 1957, Whirlpool entered the vacuum cleaner field through the acquisition of Birtman Electric Co., which had previously manufactured vacuum cleaners for sale to Sears under the Kenmore label. (A. 323.) Whirlpool continued this business. (A. 57.) Starting in 1957, it also manufactured vacuum cleaners for sale to distributors under the "RCA-Whirlpool" brand.* (Tr. 652-656.) Whirlpool's distribution of vacuum cleaners under its own brand name was unsuccessful and unprofitable so, in 1961, it discontinued this part of its business. (A. 57, Tr. 655-656.) Its lack of success in marketing vacuum

* At that time, Whirlpool was licensed to use RCA's name. That license was later terminated for reasons irrelevant to this case. Accordingly, Whirlpool's brand will be referred to hereinafter as "Whirlpool" whether or not the RCA authority was in effect at the time under discussion.

cleaners through its usual channel of distribution was due to the fact that vacuum cleaners, as compared to washing machines and similar products which its distributors were accustomed to selling, are low priced items. Its distributors could make more money selling these major appliances, and therefore devoted little time and effort to selling vacuum cleaners. (PX 13, Tr. 652-653.)

In 1963, Whirlpool decided to resume the manufacture of vacuum cleaners for sale under the Whirlpool brand name, but decided to market them and other products that it hoped to develop through a new channel of distribution which would give it access to major dealers in the country, such as department stores and other key retail accounts. (PX 13, A. 470-471, 473.)

In April, 1963, Jack Sparks, Whirlpool's Vice President, contacted plaintiff's founder, David Oreck (A. 49, 469), who had previously been in charge of vacuum cleaner sales for Bruno New York, but was then unemployed. Bruno had been the most successful of Whirlpool's distributors in selling Whirlpool brand vacuum cleaners prior to 1961. (A. 50-51, 54-55, 466, Tr. 502-503.) Sparks outlined Whirlpool's plan. He indicated Whirlpool's willingness to appoint Mr. Oreck its exclusive United States distributor for Whirlpool brand vacuum cleaners if Mr. Oreck would undertake the entire responsibility for implementing the new distribution concept. (PX 13, A. 56-58, Tr. 640-641.) Mr. Oreck accepted and, thereafter, plaintiff, Oreck Corporation, a New York corporation (hereinafter "Oreck"), was organized as the vehicle through which he would fulfill his new responsibilities. (A. 49.)

On August 7, 1963, Oreck Corporation and Whirlpool entered into a contract (PX 3) which provided in pertinent part that Oreck Corporation would be designated as Whirlpool's exclusive distributor for the United States and its possessions of Whirlpool brand portable home vacuum cleaners (Par. 2), that the agreement would have an initial term of five years from the date upon which the first 500 vacuum cleaners were shipped to

Oreck* (Par. 1; DX F), and that after the initial five year period the agreement would continue for successive one-year terms subject to the right of either party to cancel by giving at least six months notice prior to expiration of the initial term or any subsequent one-year additional term. (Par. 1.) The agreement also specified that Oreck would purchase certain minimum quantities during the term of the agreement. (Par. 2.)

Some of the tools to be used by Whirlpool to make the vacuum cleaners and attachments were owned by Sears. Sears authorized the use of its tools to produce products for sale to Oreck in exchange for which it received a tool rental fee. (A. 330, 332, 474, 656-657, 862-863.)

Whirlpool initially manufactured two canister-type vacuum cleaners and an attachment for Oreck. (Tr. 504-505.) In 1965, it also began producing upright vacuum cleaners for Oreck. (Tr. 505.) Oreck experienced difficulty selling the Whirlpool canister models and their manufacture was discontinued in 1968. Oreck then arranged to purchase canister-type vacuum cleaners from another manufacturer, Mastercraft, while Whirlpool continued to manufacture and sell to Oreck attachments for the Mastercraft canisters, as well as upright vacuum cleaners. (Tr. 506-508, A. 410, Tr. 510-511.)

When Oreck Corporation first began operations, it concentrated its efforts upon sales to department stores in accord with the objectives originally agreed to by David Oreck and Whirlpool. (A. 785-786.) By the end of 1965, however, Oreck had changed its marketing strategy by moving away from department stores, and placing its primary emphasis upon sales to janitorial supply houses, hotels and motels. (A. 498, 578, 769, Tr. 738.)

In June, 1966, Whirlpool's Vice President Sparks received a memorandum (PX 45) from Whirlpool's President, John Platts, in which Platts noted that Whirlpool's original objective, the

* By March 13, 1964, the first 500 units had been shipped. Thus, the initial 5-year term ran from March 13, 1964 to March 13, 1969. (A. 99-100.)

new method of distribution, which could be used for vacuum cleaners and other products, had virtually disappeared. He noted there had been a shift of emphasis by Oreck away from department stores toward commercial sales areas giving rise to concerns about product quality and life endurance.* He stated that Whirlpool had to maintain its perspective as to why it was originally interested in the Oreck program and should consider how much of management's attention could be justified for the profit involved. At that time, Oreck was purchasing approximately 16,000 units per year. (PX 158.)

In September, 1966, Sol Sweet, one of Sparks' subordinates, met with plaintiff's chief officer, David Oreck, in an effort "to put them back on the track" (A. 769-770), to get plaintiff's primary sales effort redirected toward the department stores and other key retail accounts which had been the parties' agreed objective. (A. 784.) David Oreck told Sweet that it was "easier" to sell through channels of distribution other than department stores, and indicated that plaintiff's sales efforts would not be redirected.** (A. 770.) After this meeting, Sweet recommended to Sparks that Whirlpool terminate its agreement with plaintiff at the end of its initial five year term. (A. 771-772.)

In 1967, Oreck Corporation again shifted its marketing strategy. (A. 303-306, 407-408, 598.) It began a direct mail campaign to consumers using the fact that it had sold Whirlpool vacuum cleaners to hotels and motels as a "come on." It sent out ads such as PX 60 which stated that America's major hotels and institutions used the Whirlpool vacuum cleaners for which they paid full price, but that for a limited time, the consumer could purchase a machine at half price because the consumer was a member of some special group, such as "real estate executives," "industrial executives," or a "consumer test group." (PX 60, A.

* The Whirlpool brand vacuum cleaners were engineered for home and not commercial use. (Tr. 738.)

** Shortly thereafter, Oreck Corporation abandoned all efforts to sell to department stores and major retail accounts. (A. 206, 306.)

307-308.) Actually there were no special groups, this was not a "special price" and it was not available only for a limited time. Practically the entire population fell into one or another of the "special groups" and Oreck mailed the same "limited time offer" to the same consumers as many as ten times a year. (Tr. 496-497.)

Oreck's direct mail advertising with its so-called "limited time half price offer" engendered complaints first from Oreck's janitorial supply dealers who had stocked the vacuum cleaners and were being undersold by Oreck itself (A. 439-440), and later from consumers who questioned Oreck's representations. (A. 458.) Whirlpool was displeased both with the contents of the mailers, and with Oreck's utter refusal to develop the avenue of distribution Whirlpool desired and which was the basis for giving Oreck the distributorship. (A. 208-209, Tr. 1409-1410.) Sparks and Sweet both told Mr. Oreck that he should get back to their original objective (A. 501-505)* and Sweet warned Oreck that its distributorship might be terminated. (A. 774-775.) Nevertheless, direct mail received an increasing sales emphasis thereafter. (A. 304-306, 407-408, 598.)

In January, 1968, Sparks again warned plaintiff of possible termination (DX I), and on June 27, 1968, Oreck was formally notified by Whirlpool of Whirlpool's decision to terminate the agreement at the end of its initial 5-year term, March 13, 1969.** (DX F, A. 804.)

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* As Sparks testified on examination by plaintiff's counsel:

> Q. "Can't we at least agree on this, that both you and Sweet were against it [mail order] while Oreck was for it? Can we agree to that?
>
> A. We were for the distribution that we had originally planned. We weren't against anything. We were for something." (A. 506.)

** In addition to its failure to establish the type of distribution system originally envisioned by Whirlpool, Oreck's volume was so low that the business was unprofitable for Whirlpool. (A. 512-513.) As of May, 1968, Whirlpool had shipped an aggregate of

(Footnote continued on next page.)

Plaintiff's president, David Oreck, complained that he would lose all of his investment, contended that he had done a good enough job to be retained, and threatened litigation if Whirlpool adhered to its decision. (A. 171-172, 176-177.) He asked that Oreck Corporation be allowed to continue as a distributor for just three years so that he could get his investment back. (A. 430-431, Tr. 1433.)

Whirlpool acquiesced in this request and the parties reached a new agreement. The original 1963 contract was replaced by a new one dated August 1, 1968 (PX 44), which provided that the agreement would continue until December 31, 1971, *"at which time this Agreement shall expire."* (PX 44, par. 1.) There was no provision for renewal under this agreement.*

After execution of the new agreement, Oreck continued and intensified its direct mail solicitation. (A. 304-306, 407-408, 598.) Its ads continued to engender numerous complaints from consumers. (A. 458.) Whirlpool received a complaint from the Better Business Bureau concerning Oreck's tactics which was particularly embarrassing to Whirlpool because its Chairman of the Board was the President of the national Better Business Bureau. (A. 459-460.) An honorary director of Sears received an Oreck solicitation in the mail which he gave to Mr. Boyar, a Vice President of Sears and a director of Whirlpool. Boyar transmitted the letter to Mr. Ranum of Whirlpool who referred it to John Platts, Whirlpool's president, with this note:

> "We got a letter from Sid Boyar in which he forwarded a letter from an old friend of Whirlpool who had received an Oreck offer and also thought this type of selling would give Whirlpool a bad name." (PX 60, A. 830-831.)

(Footnote continued from preceding page.)
only 58,312 vacuum cleaners and attachments to Oreck in more than four years. (PX 46.) This was almost 12,000 fewer units than the minimum required by the agreement. (PX 3, 46.)

* Pursuant to the Agreement, plaintiff, represented by counsel, gave Whirlpool a general release, dated September 10, 1968. (PX 44, DX H, A. 180, 432-437.)

Although the purpose of the Oreck arrangement was to promote the Whirlpool brand name on vacuum cleaners, Oreck, on occasion, asked Whirlpool to manufacture a vacuum cleaner and attachment under a private label without the Whirlpool name. Whirlpool declined. So Oreck sold Whirlpool vacuum cleaners to a customer which pasted its own label over the Whirlpool name. (A. 262-263, 634.)

Plaintiff sold vacuum cleaners in the United States and also Canada (PX 39, A. 118-119, 150-151, 154-155, 416-418), and from time to time, requested that Whirlpool obtain Canadian Standards Association (CSA) approval for the vacuum cleaners. (A. 130, 144.) Such approval by CSA in Canada is analogous to approval by Underwriters Laboratories (UL) in the United States and is not legally required in order to sell in Canada. (A. 129-132.) Whirlpool did not obtain CSA approval for the upright vacuum cleaners. (A. 131.)

To obtain CSA approval for the attachment which Whirlpool manufactured for use by Oreck with the Mastercraft canister, the attachment and the canister had to be submitted to CSA, as a unit, by Mastercraft. (DX G.) Mastercraft never submitted the unit to CSA. After the agreement with Whirlpool expired and Oreck obtained a new source for upright vacuum cleaners, the new product was not submitted to CSA for approval. (A. 421-423.) In short, neither Whirlpool nor any of Oreck's other suppliers obtained CSA approval of the products they sold to Oreck. Oreck also requested certain special packaging which Whirlpool declined to furnish. (A. 599 *et seq.*)

Sears did not know of these requests by Oreck for a private label, for CSA approval or special packaging, or of Whirlpool's reactions to those requests. (A. 766 *et seq.*, 800-884.)

On May 14, 1971, after plaintiff indicated that it was looking forward to continuing as Whirlpool's distributor after the contract expired according to its terms (PX 55), plaintiff was given formal written notice that Whirlpool did not intend to

change its 1968 decision to allow the agreement to expire on December 31, 1971. (PX 96.)

Thereafter, in July, 1971, Oreck Corporation began to order huge quantities of merchandise far in excess of its forecasts or any previous orders. (PX 99.) Whirlpool suggested that Oreck reduce its orders, but Oreck insisted that it would take everything it ordered. (PX 99, 100, A. 295-296.) Whirlpool therefore agreed to and did manufacture all of the vacuum cleaners ordered with the written understanding that they would have to be shipped and invoiced by December 31, 1971. (PX 101, A. 441.) As that deadline approached, Whirlpool repeatedly asked Oreck for shipping orders, but to no avail. (PX 102, DX N.) Whirlpool had 21,800 unshipped upright vacuum cleaners and 8,000 attachments on hand when the contract expired. (A. 518, 521.) Oreck also had an extensive inventory of Whirlpool vacuum cleaners which it continued to advertise and sell throughout 1972. (A. 445-447, 887.) In fact, David Oreck testified that Oreck Corporation may have had Whirlpool vacuum cleaners in inventory as late as December, 1973. (A. 447.)

When its agreement with Whirlpool expired on December 31, 1971, Oreck Corporation had exceeded its line of credit with Whirlpool ($200,000). It owed Whirlpool more than $220,000 for vacuum cleaners shipped prior to December 31, 1971, which it persistently refused to pay. (A. 442-443, 580, 586-587.) Whirlpool was finally compelled to institute a collection suit against Oreck in the New York Supreme Court. Whirlpool obtained a judgment against Oreck which was sustained on appeal. (A. 443.)

In 1972, after the Whirlpool contract terminated, Oreck obtained another supplier for upright vacuum cleaners which it considered superior to those previously supplied by Whirlpool, and which it has sold in increasing numbers ever since. (A. 408-409, 887-889.)

Although this case is premised upon, and the jury found that the actions complained of were not unilaterally taken by Whirlpool but were the result of a conspiracy between Whirlpool and Sears (A. 957-958), the record does not contain one iota of testimony of any conversation between a representative of Whirlpool and a representative of Sears relating to the termination of Oreck. It does not contain one iota of evidence of any conversation between a representative of plaintiff and a representative of Sears, relating to the termination of Oreck. Every witness from Whirlpool who was involved in the termination—Messrs. Sparks, Sweet and Steeb—testified unequivocally that they never consulted with Sears concerning Oreck nor did Sears have anything to do with the decision to terminate Oreck. (A. 766 *et seq.*, 800 *et seq.*, 845 *et seq.*) Likewise, Whirlpool employees who dealt with Sears in connection with the sale of vacuum cleaners by Whirlpool to Sears—Messrs. Whitman and Wardeburg—testified unequivocally that Sears never made any complaints concerning the sale of vacuum cleaners to Oreck and that Sears was not involved in any way in the termination of Oreck. (A. 872 *et seq.*, 880 *et seq.*) Sears personnel charged with the purchase of vacuum cleaners—Messrs. Smith, Danhauer and Harper—testified unequivocally that they at no time objected to the sale of vacuum cleaners by Whirlpool to Oreck, that they did not communicate with Whirlpool concerning its relationship with Oreck, that they had no part in the decision to terminate Oreck and that they learned of the termination only after it had occurred. (A. 835 *et seq.*, 860 *et seq.*, 866 *et seq.*) Mr. Boyar, a Sears Vice President who also served as a Director of Whirlpool, testified that Sears neither suggested, requested nor was it in any way involved in the Oreck termination. (A. 828 *et seq.*) Likewise, the record does not contain one document disclosing any involvement by Sears in the Oreck termination.

The only involvement of Sears in the entire Oreck matter was its authorizing Whirlpool to use Sears tools to make vacuum cleaners for Oreck (A. 862-863), and the transmission by Mr.

Boyar to Whirlpool of one of Oreck's "limited time half-price offers", received by an honorary director of Sears who opined that Oreck's direct mail advertising would have an adverse effect on Whirlpool. (PX 60, A. 830-831.)

Over objection, David Oreck was permitted to testify to two conversations with a Whirlpool salesman, John Payne. Through this testimony, plaintiff sought to tie Sears into Whirlpool's unilateral decision to cease its business relationship with Oreck. Mr. Oreck testified that in late 1967, Payne, who had no policy-making responsibility (A. 577) and no contact with Sears, told him "that some people around his place had received the mail and . . . that I ought not to rock the boat . . . [and] He suggested that we should not do mailing because the people didn't like it," and stated that "people" means the "other customer." (A. 207.)

Over objection, Mr. Oreck also testified that in June, 1968, after he received notice of the termination, he called Mr. Payne and asked him what happened, and where he (Oreck) went wrong, and that Payne stated that "I *think* our other customer got to the head of the company." (A. 175.)

No evidence was offered as to the source of or the basis for Payne's conclusion, and on cross-examination Mr. Oreck admitted that Payne did not know the reason for the termination, but was merely making an assumption. (A. 437-439.)

Finally, the record shows that in Oreck's last four years as a Whirlpool distributor it sold 160,490 vacuum cleaners and attachments. (PX 106.) In the four years following termination of its distributorship, Oreck sold 189,776 vacuum cleaners and attachments. (A. 885-889.)

No. 76-7631

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss. A. L. Brosbaw being first duly

sworn, deposes and says that he served two copies of the

Defendants' Joint Brief on Rehearing En Banc

in the above entitled cause, as per statute herein made and provided, on

Law Firm of Malcolm A. Hoffmann
12 East 41st Street
New York, New York 10017

and also filed the required number of copies of the above with the

U. S. Court of Appeals, Second Circuit

this 5th day of January, A. D. 1978.

A. L. Brosbaw

Subscribed and sworn to before me this 5th

day of January, A. D. 1978

Leonard N. Sussman

Notary Public.

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